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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 824

BARBARA ANN ELLIOTT, CLIFFORD ELLIOTT, RUBY MAE ELLIOTT, A MINOR, AND MARY ANN ELLIOTT, A MINOR,

Petitioners,

vs.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, A CORPORATION, AND FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

PAGE

The Question Presented 2

Statement of the Case 4

Argument 7

I. The majority opinion below, affirming a judgment exonerating the insurer, which specifically found that the insured was guilty of material breaches of the cooperation clause which prejudiced the insurer, was not in conflict with (a) prior decisions of the same court, or (b) decisions of other Courts of Appeals, or (c) decisions of the Kansas courts, but was squarely in accord with all controlling law 7

No conflict with other decisions of the Tenth Circuit 10

No conflict with decisions of the Courts of Appeals of any other circuit 11

No conflict with decisions of the State of Kansas 13

II. Since it has been demonstrated that the majority opinion below is not in conflict with any other decisions, it is apparent that in reality petitioners seek review of the decision below because they feel that the findings of the trial court which were approved by the reviewing court, were not supported by substantial evidence. It has been the consistent policy of this Court that certiorari will rarely be granted to review non-federal questions involving only the sufficiency of the evidence 15

III. The record amply discloses that the result reached below was in accord with substantial justice 16

Conclusion 22

CASES CITED.

Buffalo v. United States Fidelity & Guaranty Co., 84 F. 2d 883, 885 18

Chaachou v. American Central Ins. Co., 241 F. 2d 889, 892 19

Coleman v. New Amsterdam Casualty Co., 247 N. Y. 271, 160 N. E. 367 9

Elliott v. Johnston (Mo.), 292 S. W. 2d 589, 594 8

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849 16

Home Indemnity Co. v. Standard Accident Ins. Co., 167 F. 2d 919, 924 4

Houston Oil Co. v. Goodrich, 245 U. S. 440, 62 L. Ed. 385, 38 S. Ct. 140 16

Kindervater v. Motorists Casualty Ins. Co., 120 N. J. L. 373, 199 Atl. 606, 608 18

Metropolitan Casualty Ins. Co. of N. Y. v. Johnston, 146 Fed. Supp. 5, 3 ..... 9, 14, 17

Rogers v. Missouri Pacific Railroad Co., 352 U. S. 537, 1 L. Ed. 2d 515, 527 15

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164 16

United States v. Johnston, 268 U. S. 220, 227, 69 L. Ed. 925, 926 15

United States Fidelity & Guaranty Co. v. Wyer, 60 F. 2d 856, Cert. den. 287 U. S. 647, 77 L. Ed. 560 ..... 9, 10

Text Book Cited.

5 American Jurisprudence (Automobiles), § 545, p. 810 18

Petitioners' Cases Distinguished.

Associated Indemnity Co. v. Davis, 136 F. 2d 71 (erroneously cited by petitioners as 104 F. 2d 730) 11, 12

Jameson v. Farmers Mutual Automobile Ins. Co., 181 Kan. 100, 309 P. 2d 394, 400 13

Norwich Union Indemnity Co. v. Haas, 179 F. 2d 827, 831, 832 (Seventh Circuit) 12

State Automobile Mutual Ins. Co. v. York, 104 F. 2d 730 12

State Farm Mutual Automobile Ins. Co. v. Koval, 146 F. 2d 118 11

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

The petition and brief filed by petitioners disclose no matter or ground justifying further review by this Court of the decision of the United States Court of Appeals for the Tenth Circuit. The decision of the Court of Appeals

was not in error, and was not in conflict with the decisions of the Court of Appeals of the other Circuits, nor in conflict with its own prior decisions on the matter; the decision was not in conflict with the applicable law of the State of Kansas. Further, it appears that the gravamen of petitioners' request for further review is merely the unsupported claim that the judgment below was not supported by sufficient evidence, a ground upon which further review is seldom granted by this Court.

It is also clear that there is no federal question, or question of public importance involved here, the issues being confined solely to the controversy between the parties, involving a set of circumstances not likely to be repeated.

None of the grounds asserted by petitioners are documented by any decisions supporting petitioners' contentions.

The Question Presented.

The petitioners, either by inadvertence or by zeal of partisanship, have not fairly presented the question submitted for review. Petitioners' statement (Pet. p. 3) that the majority opinion below "held in effect that there was no necessity of a showing of prejudice by the insurance companies in order to avoid their policy obligations" is not correct, and is grossly misleading. The record completely refutes such statement. The Court of Appeals did *not* eliminate the necessity of a showing of prejudice by the insurer, but, on the contrary, affirmed a final judgment which contained the following specific findings of fact (Rec. pp. 74, 75):

> "13. The defendant Herman E. Johnston breached and violated his agreement to cooperate with his insurers, the plaintiffs herein, as required under the terms and provisions of the policy of insurance No.

MF-144 involved herein, (a) by voluntarily subjecting himself to service of summons in four actions brought by the Elliott defendants against him in the Circuit Court of Vernon County, Missouri, as the result of collusion with Pete Farabi, the attorney for the Elliott defendants; (b) by voluntariiy subjecting himself to service of summons in actions brought by two of the Elliott defendants against him in Crawford County, Kansas as the result of collusion with Pete Farabi, the attorney for the Elliott defendants; and (c) by giving plaintiffs' investigator false and misleading information in connection with his efforts to ascertain the facts pertaining to the service of summons, and not cooperating with him and plaintiff insurance companies in preparing the cases ready for trial.

14. *Such breaches by Herman E. Johnston of the cooperation clause of the policy involved here were of such gravity as to prejudice the plaintiff insurers*, and when the cooperation condition was broken, the policy and all of its benefits were at an end, at the election of plaintiffs, and plaintiffs did so elect.

15. By reason of such wilful and material breaches of the cooperation clause of the insurance policy involved herein, the defendant Herman E. Johnston has forfeited his right to all or any of the benefits afforded by Policy No. MF-144 issued by the plaintiffs to the defendant Anna Mae Johnston, under which said policy the defendant Herman E. Johnston was an additional insured, including any right of defense to the present actions pending in the District Court of Bourbon County, Kansas, and any right to indemnity by plaintiffs in the event judgments are entered against him in all or any of such actions, and that it is just, equitable and proper that a Final Decree be entered herein granting to the plaintiffs the relief sought in their Complaint for Declaratory Judgment herein." (Emphasis supplied.)

Petitioners (and, indeed, Circuit Judge Pickett, who wrote the dissenting opinion below) have ignored these specific findings of fact. The majority opinion below stands as a

decision squarely in line with the prevailing weight of authority in the Courts of Appeals and elsewhere, holding that where an insured's conduct amounts to a material breach of the cooperation clause, resulting in prejudice to the insurer, the insurer is exonerated. Thus, when the decision below is discerned in its true light, and free from petitioners' distortion, there is no justification for petitioners' erroneous statement of the question presented.

In light of a full understanding of the opinion below, petitioners' theory collapses, and even any pretense of a ground for further review vanishes.

Statement of the Case.

As disclosed by the record below, both the trial court and the Court of Appeals were confronted with a sordid story of collusion between an insured and counsel for the injured parties. The collusion not only involved a ready willingness on the part of Johnston to aid and abet the cause of the Elliotts in voluntarily submitting himself, by prearrangement with the Elliotts' counsel, to service of process in actions commenced in Missouri, a state to which Johnston was not amenable to service of process, but such devious strategem was again employed later, in a county of Kansas to which Johnston was not amenable to service of process; in addition, Johnston freely admitted that he had given false and misleading information to the representatives of the insurance companies concerning the mode and manner of service of process, and *brazenly admitted that all of such information was a "pack of lies"*. (Rec. 41; Op. App. A. 3.)

Johnston's conduct manifested monumental disregard of his contractual obligations and a pattern of irresponsibility which flaunted the very heart and purpose of the cooperation clause in the policies. As said in *Home Indemnity Co. v. Standard Accident Ins. Co.*, 167 F. 2d 919, 924: "Truth-

fulness seems to be the keystone of the cooperation arch." As shown by the undisputed record below, Johnston showed an utter contempt for truthfulness; he was guilty of the very evils which the cooperation clause was intended to prevent.

While, as pointed out above, the Court of Appeals affirmed a judgment which expressly found that Johnston's conduct had prejudiced the respondent insurance companies, a circumstance which petitioners have studiously avoided here, further serious inaccuracies and omissions in petitioners' statement of the case necessitate correction here. Petitioners say (Pet. p. 7):

> "* * * Mr. Farabi went to Herman Johnston's home and asked Johnston if he wanted to be tried in Kansas or Missouri, to which Johnston replied he would rather be tried in Missouri. * * *
>
> "Mr. Farabi did not suggest to Johnston that he (Farabi) would like to have the case tried in Missouri. * * *"

Such statements by petitioners here are not true, for the record below discloses, without dispute, that the desire to commence the actions in Missouri originated with Farabi, not Johnston, as shown by Farabi's own testimony (Rec. pp. 66, 67):

> "I just told him I represented the plaintiffs and I was going to sue him and just asked him if he ever had occasion to go to Missouri and he said he did; he said he went over there occasionally; *I said I could sue you here but I would like to sue you over there* * * *."
>
> * * * * *
>
> "*I told him I would rather sue him in Missouri than in Bourbon County, Kansas* but didn't tell him the reason. * * * Because of some unhappy experiences I have had in Bourbon County is all. * * *" (Emphasis supplied.)

Farabi's conversation was fully corroborated by Johnston's testimony, for Johnston testified (Rec. p. 31):

> "* * * I didn't know why he would like to have it tried over there but it was agreeable with me. * * *"

It is apparent that petitioners here are attempting to create a climate in which it appears that Johnston, not Farabi, was responsible for having the original injury actions commenced in Missouri, rather than in Kansas. However, as shown by the testimony of both Farabi and Johnston, Farabi, and not Johnston, planted the seed which resulted in Johnston's collusive conduct, a circumstance which, when measured by justice, amply supports the result reached below.

ARGUMENT.

I.

The majority opinion below, affirming a judgment exonerating the insurer, which specifically found that the insured was guilty of material breaches of the cooperation clause which prejudiced the insurer, was not in conflict with (a) prior decisions of the same court, or (b) decisions of other Courts of Appeals, or (c) decisions of the Kansas courts, but was squarely in accord with all controlling law.

The result reached in the majority opinion below was not in conflict with prior decisions of the Court of Appeals, Tenth Circuit, nor with the decisions of the other Courts of Appeals. Since the trial court below specifically found that Johnston's conduct in fact prejudiced the respondent insurance companies, it is elementary that such findings of fact will not be disturbed unless clearly erroneous. Certainly, on the record here, it cannot be said that the finding was other than in accord with the facts. That Johnston's conduct amounted to both a material and prejudicial breach of the cooperation clause is clear from the record below. If the Elliotts' original suits in Missouri had been allowed to proceed, Johnston would have been compelled to face trial in Missouri under conditions patently resulting in advantage to the Elliotts with corresponding prejudice and disadvantage to Johnston and the respondent insurance companies. A verdict finding Johnston negligent could have been returned by a vote of nine out of twelve Missouri jurors, instead of the unanimous verdict required in Kansas; it was a matter of judicial knowledge that Kansas witnesses could not have been compelled to

appear in Missouri, thus requiring, at best, deposition procedure in Kansas, with additional expense and the loss of "face-to-face" testimony from such Kansas witnesses; the insurers would have had to employ Missouri counsel who would have had to travel to Kansas to investigate the case; if Kansas witnesses were to be brought to Missouri for the trial, additional travel and living expense for such witnesses would have been suffered by the insurers. Further, even as recognized by the Supreme Court of Missouri, Farabi's preference for Missouri courts may have been influenced by the "reputed largesse" of Missouri juries, as compared with Kansas juries. (See *Elliott* v. *Johnston* (Mo.) 292 S. W. 2d 589, 594; and *Metropolitan Casualty Co. of N. Y.* v. *Johnston*, 146 Fed. Supp. 5, 8.)

Further, the conclusion is inescapable that, since the Elliotts, acting through Farabi, deemed it to their advantage to commence the original actions in Missouri, and to procure Johnston's collusive submission to service of process there, as a natural concomitant thereto, and *as a matter of law*, some consequent prejudice and disadvantage necessarily had to be suffered by Johnston and the insurers. As shown by the record below (Rec. p. 20), the Circuit Court of Vernon County, Missouri, in quashing service of process in the six Elliott actions specifically found "that plaintiffs' Attorney Farabi, and defendant Johnston, wrongfully and fraudulently conspired and colluded together to invoke the processes of this Court and its writ of summons caused to be issued in this action by fraudulent acts of plaintiffs' attorney and defendant." As pointed out in the majority opinion below (Op. A. 3) the result reached by the trial court in Missouri was affirmed on appeal to the Supreme Court of Missouri (*Elliott* v. *Johnston* (Mo.) 292 S. W. 2d 589).

When the Elliotts were thus deprived of the fruits of

their collusion, or, to put it colloquially, recognized that "they could not get away with the trick," they persisted in their efforts to prosecute their actions in an environment holding some further advantage to them and further detriment to Johnston and the insurers, and filed a second series of actions in Crawford County, Kansas; again, by prearrangement between Farabi and Johnston, Johnston was persuaded to come into Crawford County to accept service of summons. Only when the second attempt to serve their advantage failed, did the Elliotts commence a third series of actions in Bourbon County, Kansas, where Johnston did, in fact, reside. However, as measured by the rule long prior announced by the Court of Appeals for the Tenth Circuit in *United States Fidelity and Guaranty Co.* v. *Wyer*, 60 F. 2d 856, cert. den. 287 U. S. 647, 77 L. Ed. 560, when Johnston first aided and abetted the Elliotts' cause in Missouri the cooperation clause was then and there irrevocably breached by Johnston, and the policies were at an end, if the insurers so elected. In the *Wyer* case the Court followed the sound reasoning announced earlier by Judge Cardozo in *Coleman* v. *New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367. The trial court, in entering the judgment below, simply followed the ruling in the *Wyer* case (see *Metropolitan Casualty Insurance Company* v. *Johnston*, 146 Fed. Supp. 5, 8). After Johnston had breached the cooperation clause in a material respect, the insurers had the right to end the contract, and no subsequent act, either on the part of the Elliotts or Johnston, could restore to Johnston the rights which he had forfeited. The law has little regard for belated attempts to restore a legal status quo when patently inspired by the fact that the wrongdoer has been caught "redhanded" in a nefarious scheme.

No conflict with other decisions of the Tenth Circuit.

Petitioners' plea here for further review, grounded upon the allegations that the majority opinion below was in conflict with prior decisions of the Court of Appeals, 10th Circuit, in conflict with decisions of other Courts of Appeals, and in conflict with Kansas case law, is wholly without merit. Petitioners cite no authority whatsoever supporting their several contentions. Inasmuch as the judgment entered by the trial court in the case here specifically found that Johnston's repeated breaches of the cooperation clause were of such gravity as to actually prejudice the respondent insurance companies, the decision of the Court of Appeals below certainly cannot be said to have been a decision at variance with prior decisions on the matter here involved. The implications sought to be drawn by petitioners are not justified by the record, nor by the majority opinion. Petitioners' studious avoidance of this aspect of the litigation is an unfair distortion of this case. The result reached in the majority opinion is in precise accordance with the prior decision of the Court of Appeals, 10th Circuit, in *United States Fidelity & Guaranty Co.* v. *Wyer*, 60 F. 2d 856, cert. den. 287 U. S. 647, 77 L. Ed. 560. There the Court considered the legal consequences of certain false information given to the insurer by one Willie Buffalo, the insured. An injured party, having already recovered a judgment against Buffalo, brought action directly against the insurer. The insurer defended on the ground that Buffalo had breached the cooperation clause. Judgment was entered by the trial court for the injured party, but the reviewing court reversed such judgment, and held that the cooperation clause was one of the conditions of the policy which, when breached by the insured, ended the contract at the election of the insurer. The decision clearly announces the rule

that cooperation is a condition precedent to liability on the part of the insurer. The majority opinion rendered here below followed the reasoning of the ruling in the *Wyer* case.

Moreover, the majority opinion here below was not at variance with *any* of the few decisions cited in the petition (Pet. p. 10). Apparently in support of their statement that the majority opinion below was in conflict with prior decisions of the Court of Appeals for the Tenth Circuit, petitioners rely only on *State Farm Mutual Automobile Ins. Co.* v. *Koval*, 146 F. 2d 118. The *Koval* opinion did no more than hold that an insured's failure to attend trial did not constitute a material breach of the cooperation clause of the policy, where, under the facts there involved, it was clear his absence did not prejudice the insurer, thus providing no ground for the insurer's exoneration. It plainly appeared in that case that even if the insured had been present he could not have given any material testimony on the issues with respect to the injuries and damage. The majority opinion here below, of course, is not at variance with the *Koval* decision. Manifestly, there is no merit to petitioners' claim that the decision here was in conflict with prior decisions of the Tenth Circuit.

No conflict with decisions of the Courts of Appeals of any other circuit.

Further, the majority opinion, here below, was not in conflict with decisions of any of the other United States Courts of Appeals, and quite patently not in conflict with the two decisions cited by petitioners (Pet. p. 10). Petitioners cite first "*Associated Indemnity Co.* v. *Davis*, C. C. A. N. C., 104 F. 2d 730", but *obviously this is an erroneous citation*, for the case reported at 104 F. 2d

730 is *State Automobile Mutual Ins. Co.* v. *York*. We have ascertained that *Associated Indemnity Co.* v. *Davis* is reported at 136 F. 2d 71. Whether petitioners intended to rely on the *Associated Indemnity* case or the *York* case is without materiality, for neither case is at variance with the majority opinion here. In the *York* case, the Court of Appeals for the Fourth Circuit, did no more than express the view that discrepancies in statements made by the insured must be made in bad faith and must be material in nature and prejudicial in effect. The trial court here below, on ample evidence, and upon admissions of Johnston himself found that Johnston's "pack of lies" was a material breach of the cooperation clause and prejudicial in effect.

Associated Indemnity Co. v. *Davis*, actually reported in 136 F. 2d 71, supplies no more support for petitioners than the *York* case. The *Associated Indemnity* decision merely held that, on the facts there presented, the acts of the insured who originally refused to consult with the insurer's attorney, but who later advised the insurer he was available for consultation and who actually did appear at the trial and testified, did not prejudice the insurer. The majority opinion here below was plainly not contrary to such decision.

Nor was the majority opinion here below in conflict with *Norwich Union Indemnity Co.* v. *Haas*, 179 F. 2d 827 (Seventh Circuit), where the facts disclosed that the circumstances surrounding a misrepresentation by the insured did not prejudice the insurers. Moreover, it was made clear there that in any event, the insurer was held to its obligation because *it had waived the breach, if any, of the cooperation clause by the insured* (179 F. 2d l.c. 831, 832).

No conflict with decisions of the State of Kansas.

Similarly, there is no merit to petitioners' claim that the decision below was at variance with prior decisions of the Supreme Court of the State of Kansas. To support their contention in this regard, petitioners again cite but one case (Pet. pp. 10, 11), *Jameson* v. *Farmers Mutual Automobile Ins. Co.*, 181 Kan. 100, 309 P. 2d 394. Examination of that single decision discloses that the insurer was denied exoneration only because the court there rejected the insurer's contention that the insured had not given timely notice of the accident (309 P. 2d l. c. 399), *an issue not involved here*. The question of lack of cooperation by the insured was not really involved, and indeed, was not seriously argued by the insurer. This is clear from the opinion, where it is said, 309 P. 2d 400:

> "This brings us to the question of failure of cooperation on the part of the insured, *which is hinted by appellee (the insurer) but not strenuously urged.* • • •" (Emphasis and parenthetical explanation supplied.)

Moreover, even the "hint" of lack of cooperation involved only the question of whether the insurer could disclaim liability under claim of lack of cooperation by the insured, based on their inability to locate the policyholder before trial; the case did not involve the question of *affirmative conduct on the part of the insured* constituting a material breach of the cooperation clause. Obviously the *Jameson* case is without application to the issues involved here, and may not even remotely be regarded as a decision at variance with the majority opinion here. Indeed, it is clear from the *Jameson* opinion that Kansas will not permit an insurance company to be "filched" by affirmative conduct by an insured violative of the cooperation clause, for the Supreme Court of Kansas said, 309 P. 2d l. c. 400:

> "• • • Such is the only proper rule in order to avoid conspiracy between an insured and an injured person to filch the coffers of an insurance company, • • •."

Both the trial court and the Court of Appeals here below were confronted with repeated affirmative acts on the part of Johnston, in active collusion with the Elliotts or the Elliotts' counsel, plainly intended to aid and abet the Elliotts' cause, with inescapable prejudice and detriment to the respondent insurance companies.

In the course of the opinion of the trial court below (*Metropolitan Casualty Ins. Co. of N. Y.* v. *Johnston*, 146 F. Supp. 5), the trial judge said, p. 8:

> "This court is inclined to take essentially the same view of the admitted facts as that taken by the Missouri court. • • • •"

In so ruling, the trial judge was referring to findings made by the Circuit Court of Vernon County, Missouri, which latter court, when it sustained the motions to quash service of summons on Johnston in the six actions brought there by the Elliotts, said, in a memorandum opinion (Rec. 20, 72):

> "4. The court further finds that plaintiffs' Attorney Farabi, and defendant Johnston wrongfully and fraudulently conspired and colluded together to invoke the processes of this court and its writ of summons caused to be issued in this action by fraudulent acts of plaintiffs' attorney and defendant."

As the trial judge further pointed out in his opinion (146 Fed. Supp. 5, 8):

> "• • • *That there was a failure of the insured to cooperate with his insurers, which was of such gravity as to prejudice them, seems clear.* • • • •" (Emphasis supplied.)

It thus appears that petitioners' argument that the majority opinion here below was contrary to the applicable law of Kansas is as empty of merit as their claim that the decision was contrary to prior decisions of the Court of Appeals, 10th Circuit.

Examination of the remaining cases cited by petitioners (Pet. p. 10) upon abstract propositions of law, including decisions from the state courts of Oregon and Louisiana which manifestly have no materiality to the issues here, demonstrates conclusively the utter poverty of petitioners' position here.

II.

Since it has been demonstrated that the majority opinion below is not in conflict with any other decisions, it is apparent that in reality petitioners seek review of the decision below because they feel that the findings of the trial court which were approved by the reviewing court, were not supported by substantial evidence. It has been the consistent policy of this Court that certiorari will rarely be granted to review non-federal questions involving only the sufficiency of the evidence.

Petitioners' plea for further review of the decision below, in reality, rests upon a charge that the evidence did not support the findings of the trial court. It has been the consistent policy of this Court to deny application for certiorari when the sole question pertains to sufficiency of evidence in the trial court. As said in *United States* v. *Johnston*, 268 U. S. 220, 227, 69 L. Ed. 925, 926:

> "We do not grant a certiorari to review evidence and discuss specific facts."

This view was also recently announced in the separate opinion of Mr. Justice Frankfurter in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 537, 1 L. Ed. 2d 515, 527.

This principle was also followed by this Court in *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 62 L. Ed. 385, 38 S. Ct. 140; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849.

III.

The record amply discloses that the result reached below was in accord with substantial justice.

The petitioners urge that further review of the decision below is necessary in order that substantial justice be accorded to the Elliotts. We respectfully submit that, on the undisputed record of repeated collusion between Johnston and Farabi, counsel for the Elliotts, who necessarily must bear the consequences of the acts of Farabi, their counsel, who represented them not only throughout the litigation below, but even here on their petition, it is clear, beyond any doubt that the loss of Johnston's rights under the insurance policy is in accord with every concept of justice.

The Court of Appeals below said (Op. A. 5, 6):

> "There can be no doubt that in the instant case Johnston's admitted "pack of lies" concerning his submission to Missouri process was both intended to mislead the appellee company and to further and aid his collusive understanding with the claimants' counsel. He had consulted with opposing counsel, agreed to lend himself to that attorney's desires, did so, and then falsely testified concerning the arrangement in order to hide the collusion. * * *"
>
> * * * * *
>
> "Johnston's failure to cooperate with appellee consists not only in his lack of veracity, but in his active

> cooperation with the attorney Farabi. * * * But where collusive service to which the insured would not otherwise be amenable is combined with outright falsehood, the combination certainly does not spell out cooperation."

A plea for "substantial justice" mouthed by those who were *twice* judicially found to be guilty of dishonest and collusive conduct, paradoxically urges that this Court forsake the very foundations of justice. Such a plea demonstrates only an implicit contempt for the just processes of the law. Such plea should not evoke sympathy, but only astonishment for the brashness of such request.

We take issue with the statement of petitioners (Pet. p. 10) that the policy of insurance does not forbid the insured from "so maneuvering as to secure a trial in a venue of his choice." Petitioners cite no authority in support of this statement. In direct refutation of such statement is the sound reasoning of Judge Mellott, the trial judge below, found in his opinion (*Metropolitan Casualty Ins. Co., of N. Y.* v. *Johnston*, 146 F. Supp. 5, 8):

> "* * * Nor is the argument to the effect that the insurers suffered no prejudice from being required to go into other jurisdictions to defend the suits sound. It misconceives the effect of the failure of the insured to cooperate with the insurers as specified in the contract. *They were charged with the responsibility of defending the insured. They, rather than he, had the right to determine whether it was advantageous to try such actions as might be instituted against him in the court of his domicile or in some other.* They also had the right to expect of him absolute truthfulness—'the keystone of the cooperation arch'." (Emphasis supplied.)

As shown by the record here, Johnston, by his own admissions, has established that his whole pattern of con-

duct was deliberately intended to aid the Elliotts in prosecuting their several actions in one or another jurisdiction regarded as favorable to the Elliotts. *That which was favorable to the Elliotts necessarily was prejudicial to Johnston and to the respondent insurance companies.* There could be no clearer violation of the cooperation clause than the repeated collusive acts by Johnston acting in concert with Farabi, Elliotts' counsel. Indeed, the Court of Appeals for the Tenth Circuit in *Buffalo* v. *United States Fidelity & Guaranty Co.*, 84 F. 2d 883, in speaking of the delinquent insured there, said, p. 885:

> "• • • *Nothing is more dangerous than a client (an insured) who deliberately falsifies the facts.* • • •"
> (Emphasis and parenthetical explanation supplied.)

The excuses offered by petitioners here for Johnston's conduct are vacuous, coming, as they do, *after* Johnston's collusion was discovered and rendered fruitless. To give a sympathetic ear to such empty excuses would, in reality, reward dishonest dealings, and would plainly defeat the purpose of the cooperation clause, which clause is described in 5 American Jurisprudence (Automobiles), § 545, p. 810:

> "• • • A clause of this character is a perfectly reasonable one framed with the object of protecting the insurance company against the risk of collusion between the assured and persons claiming damages for alleged torts, and is a material condition of the policy, the violation of which by the assured forfeits his right to claim indemnity under the policy. • • •"

As said in *Kindervater* v. *Motorists Casualty Ins. Co.*, 120 N. J. L. 373, 199 Atl. 606, 608, a decision which, while not controlling here, nevertheless is one which illuminates the importance of the cooperation clause:

> "The design of the provision in question was not only to obviate the risk of a covinous or collusive combination between the assured and the injured third

party, but also to restrain the assured from voluntary action materially prejudicial to the insurer's contractual rights, *especially in the exercise of its exclusive function to defend claims made under the policy.* * * *" (Emphasis supplied.)

* * * * *

"The terms of the contract, as understood by a person of reasonable intelligence, measure the insurer's obligation; and there can be no recovery, in the absence of the elements of estoppel or waiver, where the assured has breached in matters of substance a reasonable protective provision made the determinative of liability. This regulation of the assured's conduct is essentially reasonable. *Without these protective provisions, the insurer would be at the mercy of dishonest and culpably indifferent policy holders, for thereby it would run the risk of impoverishment to the detriment of honest claimants. Neither the public nor private interest is served by laxity in this regard.*" (Emphasis supplied.)

By his own admission, Johnston, the man upon whose rights the Elliotts depend, is shown to be "a dishonest and culpably indifferent insured."

Apt and persuasive reasoning demonstrating the inherent justice in the loss of rights under a policy because of immoral and dishonest acts on the part of the policyholder is found in *Chaachou* v. *American Central Ins. Co.*, 241 F. 2d 889, a decision of the Court of Appeals, 5th Circuit, rendered in 1957. While the *Chaachou* case did not involve the cooperation clause of an automobile insurance policy, it nevertheless provides sound reasoning having equal application to the issues here involved. Judgment was rendered below for the insurer there and affirmed by the Court of Appeals, which, in its opinion, said (241 F. 2d 889, 892):

"We think that, as against this attack, the Court's charge was eminently correct. We start, first, with a

contract which, plain in its terms, cannot be ignored by invoking the principle which deplores forfeitures, *Fidelity-Phenix Fire Insurance Co.* v. *Benedict Coal Corporation*, 4 Cir., 64 F. 2d 347, cert. den. 289 U. S. 762, 77 L. Ed. 1505, or construes policies most strongly against the insurer in favor of the assured, *Palatine Insurance Company* v. *Whitfield*, Sup. Ct. Fla., 73 Fla. 716, 74 So. 869. Thus the agreement of the parties called precisely for honesty and fair dealing by the assured and unless there be a public policy against people contracting to be honest and refraining from wilful false swearing and misrepresentation, it is a contract which, as any other, ought to be enforced. Taking our *Erie* lights, as best we can, *Meredith* v. *Winter Haven*, 320 U. S. 228, 238, 88 L. Ed. 9, 15, Florida, whose policy controls here, recognizes this, we think, as a valid area for contract. *American Insurance Company of Newark, New Jersey* v. *Robinson*, 120 Fla. 674, 163 So. 17, see *Hartford Fire Insurance Co.* v. *Haggar*, 5 Cir., 196 F. 2d 270.

"The contract does not spell out that it is only false swearing, misrepresentation, concealment or fraud which is successful that avoids the policy. Nor is there any reason why any such conditions should be read into it. *Clearly, in the absence of a statute, the law, which is founded on truth and justice, will not regard it as unsound that a person has lost the benefit of the contract by wilful, immoral, dishonest acts which the contract itself condemns.*

"Moreover, if the law out of some misgivings about forfeitures, were to require that the insurer demonstrate that it had been misled to its prejudice by the fraud, the policy provision would both be virtually worthless and put a premium on dishonest dealings by the assured. For if, by its own investigation, inspired perhaps by suspicions of the assured's efforts to misrepresent, the insurer satisfied itself that a fraud had been attempted and declined to pay, such a rule would mean that the assured's claim would then stand as though no dishonest acts whatsoever had been practiced. The mendacious assured, surveying the

possibilities and contemplating prospective tactics and strategy in the handling of his claim, would sense immediately that *vis-a-vis* himself and the underwriter, there would be no risk at all in his deceit. If it worked, he would have his money and, at worst, could be compelled to disgorge only by affirmative suit by the insurer if the fraud were discovered in time to be legally or practicably effective. If it didn't work—if, before consummation, fraud was detected—he would suffer no disadvantage whatsoever. It would be an everything-to-win, nothing-to-lose proposition.

"Additionally, such a rule would cast the underwriter in a role for which it is unsuited and in a process which the general good, out of long experience, considers best performed by government machinery. Convinced, as here by its own investigation of the claim, of dishonest acts by the assured, it would then have to undertake the task of segregating truth from untruth, ferreting out the honest from the dishonest, choosing the right from amongst the wrong with all or much of the factual material coming from one now considered to be morally unreliable.

"*The public interest is not furthered by these likely consequences of reading into the contractual language this burden nowhere expressed. A judge-made policy which thus gives advantage to dishonesty will retard, not accelerate, the orderly adjustment of insurance losses.* If the insurer, from the strong language of the contract interpreted in equally plain terms by the law, is entitled to assume that the assured is dealing honestly and fairly, asserting only that which in good faith is believed to be the substantial truth of the matter, the claim can be handled in a spirit and atmosphere of confidence. If, on the other hand, the insurer must realize that fraud is significant only if it is finally successful, that the slate is wiped clean if its own investigation uncovers the assured's cozening, the setting may then become one of hostile antagonism, reluctance and apprehension forcing more, not less, litigation.

"*Courts have long recognized that, 'The moral haz-*

ard is one of the main elements, if not the chief element, of an insurance risk, and it is never negligible. It is always material to the risk', Connecticut Fire Ins. Co. v. *Manning*, 8 Cir., 160 Fed. 382, 385. *It reflects the assumption that the relationship created by the contract is one requiring the utmost of honest, good faith dealing. Globe & Rutgers Fire Ins. Co.* v. *Stallard*, 4 Cir., 68 F. 2d 237, 240. *This clause then is but means of demanding, at a critical time, moral uprightness and conduct of the kind basic to the genesis of the undertaking.*" (Emphasis supplied.)

The result reached here below accords with substantial justice. If rights have been lost, it is only because Farabi chose to further his clients' advantage by procuring Johnston's willing complicity in collusive and dishonest acts not tolerated by the law. The loss of rights under such circumstances can hardly be attributed to a failure of justice. On the contrary, it is an example of law and justice being accorded their due dignity.

Conclusion.

It is respectfully submitted that the petitioners have demonstrated no ground justifying further review of the decision rendered by the Court of Appeals, 10th Circuit, below. For the reasons assigned above, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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